COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2626-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RANDALL S. HANDELAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, P.J., Deininger and Bartell,[1] JJ.

DEININGER, J. Randall Handeland appeals a judgment convicting him of several controlled substance violations. He contends that the trial court

[1] Circuit Judge Angela B. Bartell is sitting by special assignment pursuant to the Judicial Exchange Program.

erred in denying his motion to suppress evidence because police officers obtained information to support a search warrant while present within the curtilage of his residence without a search warrant. We conclude that the police officers were not within the curtilage when they viewed marijuana plants on the back porch of Handeland's residence, and we affirm the trial court's judgment.

BACKGROUND

The facts are not in dispute. Handeland owned a trailer home situated on three acres of land in rural Grant County. Law enforcement officers received an anonymous tip that marijuana was being grown on Handeland's property. To corroborate this information, two police officers drove to Handeland's property to get the license plate number from the car parked in the driveway and possibly to make contact with Handeland. The officers planned to use the pretense of asking Handeland whether he knew the whereabouts of an area resident as an excuse to approach the residence.

The two officers approached the property in an undercover capacity and in an unmarked vehicle. When the officers entered Handeland's driveway, they did not encounter any closed gates or other obstructions blocking the driveway. The driveway provided the only access to the trailer and it served only Handeland's property. Handeland had log barriers, which he would sometimes use to block vehicles from accessing the property, but the barriers were not in place on that day. The officers passed a "No Trespassing" sign posted on a tree at the side of the driveway, but they did not heed it.

The officers stopped in the driveway, near the no trespassing sign. Handeland was standing next to a car parked at the end of the driveway. One officer got out of the car and asked Handeland if he knew where to find an area

resident. Handeland said that he did not know the individual, and the officer returned to the vehicle. The officers did not enter Handeland's property beyond the driveway, nor did Handeland ask them to leave the premises. As the officers backed out of the driveway, the officer in the passenger seat saw marijuana plants on the back porch of Handeland's trailer.

The officers obtained a search warrant on the basis of the anonymous tip and their observation of the marijuana plants on Handeland's porch. They executed the warrant later that day and seized the marijuana and related paraphernalia that formed the basis for Handeland's arrest.

Handeland moved to suppress evidence obtained from the search of his property. He argued that the officers' initial inspection of his property was an unconstitutional warrantless search, which could not support a valid finding of probable cause for a search warrant. After a hearing on the motion to suppress, the trial court determined that the officers' initial inspection was not a search because they observed the marijuana from beyond the curtilage surrounding Handeland's residence. Handeland then pleaded no contest and was convicted of three controlled substance violations.[2] Handeland appeals his conviction on the grounds that the trial court erred in denying his motion to suppress evidence.

[2] Handeland was convicted of violating § 161.41(1m)(h)3, STATS., 1993-94, possession with intent to manufacture or deliver a controlled substance; § 161.42(1), STATS., maintaining a dwelling used for the use, manufacturing, keeping or delivery of a controlled substance; and § 161.573(1), STATS., possession of drug paraphernalia. These crimes are now codified at §§ 961.41(1m)(h)3, 961.42(1) and 961.573(1), STATS.

ANALYSIS

The issue before us is whether the officers' initial inspection of Handeland's property, during which they first observed marijuana plants, constitutes an unreasonable search under the Fourth Amendment to the U.S. Constitution and Article I, § 11 of the Wisconsin Constitution.[3] If the initial inspection was an impermissible search, then the information gathered by the officers could not legitimately support a search warrant, and the evidence seized during the search should have been excluded. The question of whether the officers' actions constituted an unreasonable search is a question of law, which we review de novo. *See* ***State v. Edgeberg,*** 188 Wis.2d 339, 344-45, 524 N.W.2d 911, 914 (Ct. App. 1994). However, we review the trial court's findings of historical fact only for clear error. *See* ***State v. Kennedy***, 193 Wis.2d 578, 583, 535 N.W.2d 43, 45 (Ct. App. 1995).

A search occurs when the police infringe on an expectation of privacy that society considers reasonable. *See* ***United States v. Jacobsen***, 466 U.S. 109, 113 (1984); ***Edgeberg***, 188 Wis.2d at 345, 524 N.W.2d at 914. Only if we first conclude that the officers' pre-warrant activities infringed on Handeland's legitimate expectation of privacy, and thus constituted a search, will we then inquire whether the officers' conduct was proper under the Fourth Amendment. *See* ***State v. Rewolinski,*** 159 Wis.2d 1, 12-13, 464 N.W.2d 401, 405 (1990). When a potential search occurs in the area adjacent to a residence, the concept of "curtilage" provides a useful analytical framework to determine the extent of the

[3] The Fourth Amendment to the U.S. Constitution and Article I, § 11 of the Wisconsin Constitution provide, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...."

area surrounding the residence in which an individual has a reasonable expectation of privacy. *See* ***United States v. Dunn***, 480 U.S. 294, 300-01 (1987); ***State v. Lange***, 158 Wis.2d 609, 618-21, 463 N.W.2d 390, 393-94 (Ct. App. 1990) (adopting ***Dunn*** factors in Wisconsin).

"The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." ***Dunn***, 480 U.S. at 300. The concept is employed in Fourth Amendment analysis to delineate "the area [which] harbors the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'" ***Id***. (quoted sources omitted). Under ***Dunn***, four factors are relevant to determining the extent of a dwelling's curtilage:

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Id. at 301.

The curtilage analysis thus encompasses both questions which must be answered in the affirmative in order to conclude that a defendant has a reasonable expectation of privacy in a certain location:

> The determination of whether the defendant had a reasonable expectation of privacy depends on two separate questions. The first question is whether the individual by his conduct exhibited an actual, subjective expectation of privacy. The second question is whether such an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable.

Rewolinski, 159 Wis.2d at 13, 464 N.W.2d at 405. Consideration of whether an enclosure is present and the steps taken to preclude observation by the public focus upon a defendant's conduct in exhibiting a subjective expectation of privacy,

whereas proximity and the nature of the use of the area in question bear more directly on the objective inquiry: is the defendant's expectation of privacy one that society recognizes as reasonable? A defendant bears the burden of proving that his or her expectation of privacy meets both the subjective and objective criteria. ***Id***. at 16, 464 N.W.2d at 406-07.

Handeland contends the trial court erred by not explicitly applying ***Dunn's*** four-factor curtilage analysis, or the more general six-factor analysis relevant to a determination of whether a defendant has an expectation of privacy that society is willing to recognize as reasonable, as set forth in ***State v. Dixon***, 177 Wis.2d 461, 469, 501 N.W.2d 442, 446 (1993). We disagree. Neither list of factors is a controlling standard. The ***Dunn*** factors are useful only to the extent they illuminate the central issue, which remains whether "the area in question harbors those intimate activities associated with domestic life and the privacies of the home." ***Dunn***, 480 U.S. at 301 n.4. Similarly, the factors listed in ***Dixon*** are "not controlling or exclusive. The totality of the circumstances is the controlling standard." ***Dixon***, 177 Wis.2d at 469, 501 N.W.2d at 446. Accordingly, the trial court was not required to explicitly apply either test, but only to analyze whether, under the totality of the circumstances, the officers violated Handeland's reasonable expectation of privacy.

Handeland also claims the trial court erred in concluding that the curtilage of a trailer is smaller than that of a permanent home. Again we disagree. Handeland's interpretation of the trial court's order contradicts the order's plain language. The trial court did not conclude that the curtilage of a trailer is necessarily smaller than that of a permanent home. The trial court determined that "[b]ecause of the nature of the trailer *in this case*, the curtilage is a much smaller area" (emphasis added). The trial court's language indicates that it based its

determination on the facts of the case at hand, and not on an erroneous view of the law.

Moreover, the trial court's expressed rationale for its decision to deny the suppression motion is not the central issue in this appeal. The trial court made factual findings sufficient for a determination of the curtilage issue. Because the constitutional issue is one which we decide de novo, we need only determine whether, on the facts of record, the trial court's ultimate conclusion that the officers were not within the curtilage of Handeland's residence was proper.

The trial court determined that the marijuana plants observed by the officers on their initial visit were within the curtilage of Handeland's home. These plants, however, were visible to the officers from the driveway. So long as the officers had not penetrated the curtilage at the time they first saw the plants, they were free to observe what was within the curtilage without violating Handeland's Fourth Amendment rights. *See* ***State v. Kennedy,*** 193 Wis.2d 578, 586, 535 N.W.2d 43, 46 (Ct. App. 1995). Our inquiry is thus directed to whether the portion of Handeland's driveway traveled by the officers on their initial visit was within the curtilage of his home, so that Handeland had a reasonable expectation of privacy in that area. We examine each of the four ***Dunn*** factors in turn. We apply the ***Dunn*** curtilage analysis, rather than the ***Dixon*** six-factor analysis of society's willingness to recognize an expectation of privacy as reasonable, because the ***Dunn*** analysis is specifically tailored to determining the reasonable expectation of privacy in areas adjacent to the home, and because, as we have discussed, the curtilage analysis encompasses both the subjective and the objective dimensions of the inquiry.

a. Proximity of the area to the home.

The trial court determined that the officers were a "substantial distance" from the trailer when they first saw the marijuana plants, but the court did not make a precise finding of the distance. The best indication from the record is that the officers were approximately sixty feet away from the trailer when they viewed the marijuana.[4] This distance does not weigh heavily on either side of the curtilage determination. It is shorter than sixty yards—a distance considered "substantial" by the Supreme Court, *see* ***Dunn,*** 480 U.S. at 302, but longer than ten yards—a distance that weighed in favor of a finding of curtilage in ***Lange***, 159 Wis.2d at 618, 463 N.W.2d at 393. *See also* ***United States v. Depew,*** 8 F.3d 1424, 1427 (9th Cir. 1993) (citing cases and concluding that a distance of 50-60 feet is indecisive under ***Dunn*** analysis).

b. Whether the area is in an enclosure with the home.

The trial court did not expressly determine whether there was an enclosure, or whether the officers were within an enclosure, when they saw the marijuana. The record indicates that the area surrounding Handeland's trailer was enclosed to some extent by its natural surroundings. The trailer and the area immediately in front of it are surrounded on three sides by fairly dense woods. The area is open, however, on the roadway side. Handeland sometimes used a log barricade to prevent people from coming up the driveway, but he was not using the barricade the day the officers entered the driveway. Although an opening for a

[4] The officer who first observed the marijuana testified that he was "in the vicinity of the no trespassing sign" when the observation was made. Another officer, who came back later to take pictures of the scene, testified that he was sixty feet away from the trailer while on the roadway side of the no trespassing sign when he could see the plants on the back porch.

driveway would not preclude a finding that an enclosure exists, *see* ***Lange,*** 158 Wis.2d at 618-19, 463 N.W.2d at 393, it is unclear from the record whether the trailer's natural surroundings constituted an enclosure, or what the boundary of such an enclosure would be on the roadway side.

We conclude that the officers viewed Handeland's marijuana plants from outside any enclosure which might be deemed to have existed. The officers were "on the driveway portion" of the property when the marijuana was discovered. The officer who first noticed the marijuana testified that he was "in the vicinity of the no trespassing sign" at the time. It appears from several exhibits[5] that the portion of the driveway in the vicinity of the sign is outside whatever natural enclosure might have been created by the surrounding foliage.

c. Use to which the area is put.

The trial court made no explicit findings regarding the purposes for which Handeland used the driveway area, but the record shows the area near the no trespassing sign was used only for parking cars. Under some circumstances, a driveway might be used for "intimate activities." *See* ***Depew,*** 8 F.3d at 1427-28 (secluded driveway held to be within curtilage in part because resident was a nudist who walked around nude in driveway). But a driveway visible from a county road and used for access to the residence and for parking cars does not generally "harbor[] those intimate activities associated with domestic life and the privacies of the home." ***Dunn***, 480 U.S. at 301 n.4. We conclude, therefore, that

[5] Exhibit 4 is a photograph of Handeland's property looking up the driveway from the road. It shows that the area on the driveway side of Handeland's property is open from the road to the tree on which the "no trespassing" sign is posted. Other photographs showing the driveway area, exhibits 7 and 11, suggest the same conclusion.

Handeland's use of the pertinent portion of the driveway weighs against it being within the curtilage.

d. Steps taken to protect the area from observation.

Handeland took no steps to protect the driveway area from the observations of passersby. He sometimes took precautions to prevent people from entering the driveway, but photographs of Handeland's property show that the driveway area was visible from the road at all times—even when the foliage was mature.

Handeland's no trespassing sign is of some relevance to a consideration of whether he had a reasonable expectation of privacy in the driveway area in question, although we conclude its relevance is slight.[6] The posting of signs is not explicitly among the ***Dunn*** factors, except to the extent it can be deemed a step taken to protect an area from observation. Since the area we are concerned about was in the immediate vicinity of the sign, the sign can hardly be said to have protected that area from observation by passersby. Furthermore, Handeland's posting of the no trespassing sign does not itself extend Fourth Amendment protection to the driveway area. *See* ***Oliver v. United States***, 466

[6] Handeland's no trespassing sign is more significant as an effort to protect the *inner* areas of his property from observation. *See* ***United States v. Depew,*** 8 F.3d 1424, 1428 (9th Cir. 1993). But whether the interior areas of Handeland's property are within the curtilage is not at issue here—our focus is on the portion of the driveway from which the challenged observation was made. Likewise, it is not significant that Handeland took precautions to protect the marijuana plants at the side and rear of his trailer from public view. In spite of those efforts, the plants were visible from the driveway area in question, at least before the full summer foliage had grown up. As we have noted above, if the driveway area was beyond the curtilage, the officers were free to observe what they could within the curtilage from that vantage point. *See* ***State v. Kennedy,*** 193 Wis.2d 578, 586, 535 N.W.2d 43, 46 (Ct. App. 1995).

U.S. 170, 183-84 (1984) (intrusion that may be a trespass is not necessarily a search under the Fourth Amendment). We conclude that under the circumstances of this case, the no trespassing sign did not manifest a reasonable expectation of privacy in the driveway area.

The record indicates that the no trespassing sign was not clearly visible until one had already traveled part way up the driveway. Moreover, the posting of a no trespassing sign on a three acre tract of wooded land in a rural area generally indicates that the public is not welcome to stroll in the woods, but it does not necessarily indicate that the public is not welcome to approach the home. The sign did not say, for example, "Private Drive—Do Not Enter." Finally, we note that Handeland was near the driveway when the officers drove up, and he did not wave them off or ask them to leave. This failure would tend to negate any inference that the sign was meant to exclude visitors from using the driveway to approach the residence.

In summary, we conclude, on the basis of our analysis of the record in light of the ***Dunn*** factors, that the driveway area from which the officers first saw marijuana plants was outside the curtilage of Handeland's residence. The first factor, the proximity of the driveway area to the home, is not particularly helpful, but the other three factors suggest that the driveway area is outside the curtilage. The no trespassing sign, though perhaps relevant to a consideration of Handeland's subjective expectation of privacy in some portions of his property, does not by itself indicate that Handeland expected to exclude the public from access to the driveway area. Since we have concluded the area from which the officers made their initial observation of contraband was not within the curtilage, and thus Handeland had no reasonable expectation of privacy in that area, we need not consider the motivations of the officers or the reasonableness of their conduct

in going to that location. *See* ***Rewolinski,*** 159 Wis.2d at 12-13, 464 N.W.2d at 405.

Although we conclude that the driveway area in question was outside the curtilage, we note that entry by officers onto areas within the curtilage which are implicitly open to the public, such as walkways or access routes, also does not constitute a search and therefore does not implicate the Fourth Amendment. *See* ***Edgeberg,*** 188 Wis.2d at 347, 524 N.W.2d at 915. Handeland's driveway was the only means of access to his home. As the trial court found, the officers entered Handeland's property only as would a member of the public: "[t]he officers did not conduct themselves any different than a normal person might do who was looking for instructions …." We conclude that the driveway area in question was the "normal means of access to and from" Handeland's residence, and hence the area was implicitly open to the public. *See* ***id.*** Thus, even if we were to conclude that the driveway area was within the curtilage of Handeland's residence, we would sustain the denial of his motion to suppress.

CONCLUSION

For the reasons discussed above, we conclude that the officers had not penetrated an area in which Handeland had a reasonable expectation of privacy when they first saw marijuana plants. The officers' observation of evidence from a lawful vantage point was not a search, and what they saw on Handeland's property could properly serve as a basis for a search warrant. The trial court was therefore correct in denying Handeland's motion to suppress the evidence seized during the execution of the warrant on Handeland's property. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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